

Letter of Findings Number: 04-20120351
Sales/Use Tax
For Tax Years 2008 through 2010

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ISSUES

I. Sales/Use Tax – Imposition – Exempt Jobs.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1; IC § 6-2.5-3-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1; IC § 6-8.1-5-1; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044 (Ind. Tax Ct. 2002); USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466 (Ind. Tax Ct. 1993); [45 IAC 2.2-3-9](#); [45 IAC 2.2-3-10](#); [45 IAC 2.2-3-12](#); [45 IAC 2.2-4-22](#); [45 IAC 2.2-4-23](#).

Taxpayer protests the Indiana Department of Revenue's proposed assessments on certain purchases, claiming its customers were exempt from sales/use tax.

II. Tax Administration – Interest.

Authority: IC § 6-8.1-10-1.

Taxpayer protests the imposition of interest.

STATEMENT OF FACTS

Taxpayer is an Indiana contractor that specializes in installing insulation for industrial, commercial, and institutional customers. In performing the insulation contracts, Taxpayer charges its customers on a lump-sum basis.

In 2011, the Indiana Department of Revenue ("Department") conducted a sales/use tax audit of Taxpayer's business records for tax years 2008, 2009, and 2010 ("Tax Years at issue"). The Department and Taxpayer agreed to utilize a sample selected from Taxpayer's 2010 records and a projection method to perform the audit on use tax for the Tax Years at issue.

Pursuant to the audit, the Department concluded that Taxpayer did not pay sales tax or self-assess use tax on certain tangible personal property which Taxpayer used in its business activities. Specifically, the Department determined that Taxpayer did not pay the sales/use tax on the materials it used to perform the "lump-sum" contracts, nor did Taxpayer obtain the properly executed exemption certificates from the customers who claimed the sales/use tax exemptions. The Department's audit thus assessed additional use tax and statutory interest on those purchases of tangible personal property.

Taxpayer protested the assessment and provided additional documentation to support its protest. An administrative hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales/Use Tax – Imposition – Exempt Jobs.

DISCUSSION

The Department's audit determined that Taxpayer charged its customers on a lump-sum basis; however, the Department found that, for tax year 2010, Taxpayer failed to pay sales/use tax on materials which it used in performing the insulation contracts. Taxpayer claimed that it was not responsible for paying sales/use tax because these customers claimed that they were exempt from sales/use tax. Thus, Taxpayer believes that the Department's assessments were overstated.

As a threshold issue, all tax assessments are prima facie evidence that the Department's assessment of tax is presumed correct. "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007); Indiana Dep't. of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012).

Indiana imposes an excise tax called "the state gross retail tax" (or "sales tax") on retail transactions made in Indiana. IC § 6-2.5-2-1(a). A person who acquires property in a retail transaction (a "retail purchaser") is liable for the sales tax on the transaction. IC § 6-2.5-2-1(b). Indiana also imposes a complementary excise tax called "the use tax" on "the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a). "Use" means the "exercise of any right or power of ownership over tangible personal property." IC § 6-2.5-3-1(a). The use tax is functionally equivalent to the sales tax. See Rhoades v. Indiana Dep't of State Revenue, 774 N.E.2d 1044, 1047 (Ind. Tax Ct. 2002).

By complementing the sales tax, the use tax ensures that non-exempt retail transactions (particularly out-of-state retail transactions) that escape sales tax liability are nevertheless taxed. Id.; USAir, Inc. v. Indiana Dep't of State Revenue, 623 N.E.2d 466, 468–69 (Ind. Tax Ct. 1993). The use tax ensures that, after such goods

arrive in Indiana, the retail purchasers of the goods bear their fair share of the tax burden. To trigger imposition of Indiana's use tax, tangible personal property must (as a threshold matter) be acquired in a retail transaction. Id. A taxable retail transaction occurs when (1) a party acquires tangible personal property as part of its ordinary business for the purpose of reselling the property; (2) that property is then exchanged between parties for consideration; and (3) the property is used in Indiana. See IC § 6-2.5-1-2; IC § 6-2.5-4-1(b), (c); IC § 6-2.5-3-2(a).

[45 IAC 2.2-3-9](#), in relevant part, states:

(c) A contractor has the burden of proof to establish exempt sale or use when construction material, which was acquired tax-free, is not subject to either the state gross retail or use tax upon disposition.

(d) Disposition subject to the state gross retail tax. A contractor-retail merchant has the responsibility to collect the state gross retail tax and to remit such tax to the Department of Revenue whenever he disposes of any construction material in the following manner:

(1) Time and material contract. He converts the construction material into realty on land he does not own and states separately the cost for the construction material and the cost for the labor and other charges (only the gross proceeds from the sale of the construction materials are subject to tax), or

(2) Construction material sold over-the-counter. Over the counter sales of construction materials will be treated as exempt from the state gross retail tax only if the contractor receives a valid exemption certificate issued by the person for whom the construction is being performed or by the customer who purchases over-the-counter, or a direct pay permit issued by the customer who purchases over-the-counter.

(e) Disposition subject to the use tax. With respect to construction materials a contractor acquired tax-free, the contractor is liable for the use tax and must remit such tax (measured on the purchase price) to the Department of Revenue when he disposes of such property in the following manner:

(1) He converts the construction material into realty on land he owns and then sells the improved real estate;

(2) He utilizes the construction material for his own benefit; or

(3) Lump sum contract. He converts the construction material into realty on land he does not own pursuant to a contract that includes all elements of cost in the total contract price.

(f) A disposition under C. [subsection (e)(3) of this section] will be exempt from the use tax **only if the contractor received a valid exemption certificate**, not a direct pay permit, **from the ultimate purchaser or recipient of the construction material (as converted), provided such person could have initially purchased such property exempt from the state gross retail tax. (Emphasis added).**

Thus, a "lump-sum" contract is a contract for which all necessary materials and labor are performed for one specified price. In a lump-sum contract, the customer is not charged sales tax; however, the construction contractor generally must pay sales tax or self-assess use tax on its purchase price for the materials. [45 IAC 2.2-3-9\(e\)\(3\)](#); [45 IAC 2.2-3-10\(3\)](#); [45 IAC 2.2-4-22\(e\)\(3\)](#); [45 IAC 2.2-4-23\(3\)](#).

Additionally, [45 IAC 2.2-3-12\(a\)](#) further explains that "[t]angible personal property purchased to become a part of an improvement to real estate under a contract with an organization entitled to exemption is eligible for exemption when purchased by the contractor."

In this instance, the Department's audit noted that Taxpayer charged its customers pursuant to lump-sum contracts but did not pay sales tax or self-assess use tax on the materials it used to perform the lump-sum contracts. Taxpayer presented some exemption certificates to the Department at the time of the audit. However, the audit determined that some exemption certificates were not properly executed. As a result, the Department's audit properly assessed use tax on those deemed taxable purchases accordingly.

At the hearing, Taxpayer again asserted that it was not responsible for sales/use tax because its customers were exempt. Taxpayer submitted additional documentation including copies of invoices and the customers' exemption certificates to support its protest. Upon reviewing Taxpayer's documentation, some of the exemption certificates were properly executed and, thus, the purchases should be exempt.

Taxpayer's documentation, however, also demonstrated that some of its customers did not have exemption certificates or that the exemption certificates were not properly executed. For example, some of the general exemption certificates were executed after the audit was concluded and Taxpayer did not provide the properly executed special exemption certificates, AD-70 forms. Also, some of the exemption certificates provided by Taxpayer stated different entities which were not the ultimate customers who claimed the exemptions. As a result, the Department is not able to agree that Taxpayer provided sufficient documentation to demonstrate that those customers were exempt and thus Taxpayer's purchases remain taxable.

Taxpayer is reminded that sales/use tax becomes due at the time of purchase. If its customer claims an exemption, the exemption certificate should be obtained at the time the transaction occurs; otherwise, the burden of proving the transaction was exempt falls on Taxpayer and ultimately becomes measurably more difficult.

In short, Taxpayer's protest is sustained in part and denied in part. Taxpayer's documentation demonstrated that some of its purchases should be exempt because its customers provided properly executed exemption certificates. The Department will recalculate Taxpayer's tax liability in a supplemental audit.

FINDING

Taxpayer's protest is sustained in part subject to the Department's supplemental audit review of the

additional documentation. The Department will recalculate Taxpayer's tax liability in a supplemental audit.

II. Tax Administration – Interest.

DISCUSSION

The Department assessed interest on the tax liabilities. Taxpayer protests this imposition of interest.

IC § 6-8.1-10-1(a) provides, as follows:

If a person fails to file a return for any of the listed taxes, fails to pay the full amount of tax shown on the person's return by the due date for the return or the payment, or incurs a deficiency upon a determination by the department, the person is subject to interest on the nonpayment.

Pursuant to IC § 6-8.1-10-1(e), the Department does not have the authority to waive the interest. Therefore, Taxpayer's protest is denied.

FINDING

Taxpayer's protest to the imposition of interest is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest of the imposition of sales/use tax is sustained in part pending the Department's supplemental audit review. However, Taxpayer's protest of the imposition of interest is respectfully denied.

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